

RED TOP MERCURY MINES, INC.

IBLA 85-872

Decided April 14, 1987

Appeal from a decision of the Anchorage, Alaska, District Office, Bureau of Land Management, declaring six mining claims and one millsite claim abandoned and void for failure to timely file evidence of assessment work or notice of intent to hold. AA-38981 through AA-38987.

Affirmed as modified in part; reversed in part and remanded.

1. Evidence: Presumptions -- Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Recordation

The presumption that BLM employees have not lost or misplaced evidence of annual assessment work for an unpatented mining claim, required to be filed on or before Dec. 30, 1981, under sec. 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1982), will not be overcome by proof that BLM mishandled evidence of annual assessment work filed during the 1984 calendar year.

2. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Recordation

BLM may properly declare an unpatented mining claim abandoned and void under sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), where the owner fails to timely file with BLM either evidence of annual assessment work or a notice of intention to hold the claim on or before Dec. 30 of any calendar year following the first filing of such evidence or notice.

3. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Recordation

Not every document filed with BLM from which intent might be inferred is sufficient to meet the statutory and regulatory requirements for notices of intention to hold mining claims. Such a document must be filed as a notice of intent and meet those requirements.

4. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Millsites: Generally -- Mining Claims: Millsites

The failure to file an annual notice of intention to hold a millsite claim is a curable defect, and BLM may not declare a millsite claim abandoned and void without first according the claimant an opportunity to comply with a notice of deficiency.

APPEARANCES: Randall E. Farleigh, Esq., Anchorage, Alaska, for appellant; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Alaska Region, Anchorage, Alaska, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Red Top Mercury Mines, Inc. (Red Top), has appealed from a decision of the Anchorage District Office, Bureau of Land Management (BLM), dated July 25, 1985, deeming six mining claims and one millsite claim 1/ abandoned and declaring them void for failure to file either evidence of assessment work or notice of intent to hold in a timely fashion as required by section 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) (1982), and 43 CFR 3833.2.

BLM's decision recited that the location notices for the mining claims and the millsite were filed with BLM on December 20, 1976, in accordance with section 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1982), and the regulations at 43 CFR 3833.2. Further, BLM's decision explained that "[b]ecause one or more of the affidavits of assessment work or notices of intention to hold were not timely filed, the mining claims and mill site listed on the attached appendix are deemed abandoned and declared void." (Footnote omitted.) The appendix shows that, according to BLM's records, Red Top failed to make its annual filing with regard to the mining claims in the years 1981 and 1984, and with regard to the millsite in the years 1978, 1979, 1980, 1981, and 1984.

In its statement of reasons, Red Top advances three arguments why BLM erred in declaring its mining claims abandoned and void under section 314(c) of FLPMA, 43 U.S.C. § 1744(c) (1982). First, Red Top asserts that it did, in fact, file affidavits of assessment work for all six of the mining claims in both 1981 and 1984. In support of its argument, Red Top refers to

1/ The claims involved in this appeal and the location dates are listed in Appendix A.

"an actual copy of his 1984 affidavit filing for all of the mining claims herein, which conclusively proved his timely filing" (Statement of Reasons (SOR) at 2). According to Red Top, "[c]onclusive proof of the 1984 filing has been located, demonstrating the probability that BLM also lost the duplicate copy of the combined 1980-81 filing" which Clarence Wren, President of Red Top, believed he filed in 1981 (SOR at 1; Wren Affidavit at 1). Second, Red Top maintains that the 1980-81 assessment filings were combined in a single affidavit and were properly recorded in December 1980. "Said combined affidavit constitutes a valid pre-filing for the year 1981 in compliance with 43 USC § 1744" (SOR at 1). And third, Red Top argues that a March 17, 1981, letter, which accompanied evidence to supplement the original recordation, "should have effectively constituted a notice of intention to hold the mining claims and prevent forfeiture" (SOR at 2).

Red Top argues that BLM improperly declared its millsite abandoned and void for failure to file a notice of intention to hold the claim in the years 1978, 1979, 1980, 1981, and 1984:

43 USC § 1744 * * * does not require an annual filing of a notice of intent to hold or assessment work affidavit for such millsites. To the extent that a valid applicable regulation of the BLM required such filing, it is a curable omission outside the forfeiture provisions of 43 USC § 1744(c).

(SOR at 2).

[1] Appellant has submitted evidence of its 1984 annual assessment work filing establishing that it was, in fact, timely filed with BLM in 1984. ^{2/} Therefore, it was error for BLM to have asserted in its decision lack of filing in 1984 as a grounds for its action. However, we reject Red Top's argument that because it filed an affidavit of assessment work in 1984, there is a "reasonable probability" that it re-filed the combined 1980-81 affidavit of assessment work in the 1981 calendar year and that it was likewise misplaced or mishandled by BLM. There is no independent evidence to support Wren's belief that he re-filed the 1980-81 proof of labor with BLM within the 1981 calendar year. Administrative officials are presumed to have properly discharged their duties and not lost or misplaced legally significant documents submitted for filing. H. S. Rademacher, 58 IBLA 152, 88 I.D. 873 (1981). This presumption of regularity is not overcome by an uncorroborated statement that the document was submitted to BLM. Cascade Energy & Metal Corp., 87 IBLA 113 (1985); John R. Wellborn, 87 IBLA 20 (1985).

^{2/} The record shows appellant timely filed an affidavit of annual assessment work on Dec. 10, 1984. However, by letter dated Dec. 18, 1984, BLM returned that affidavit to appellant because it had failed to identify the mining claim serial numbers. As stated by counsel for BLM on appeal, "[w]hile the filing was deficient for failure to list the BLM serial number, as required by 43 CFR § 3833.2-2(a)(1), that deficiency is not statutory and is, hence, curable" (Answer at 2).

Although Red Top established that BLM mishandled its 1984 affidavit of assessment work, such evidence is insufficient to overcome the presumption of regularity as applied to any 1981 filing. See Wilson v. Hodel, 758 F.2d 1369, 1374 (10th Cir. 1985).

[2] Red Top filed an affidavit of assessment work with BLM on December 10, 1980. According to appellant, this affidavit "reflects assessment work performed in both the months of August and September, 1980 sufficient to cover the mining assessment year, ending at noon on September 1, 1980, as well as commencing September 1, 1980, at noon and running through September 1, 1981, in accordance with 30 USC § 28" (SOR at 3). Red Top argues that, consistent with industry practice, "[a] miner who performs his assessment work in both August and September straddles 2 assessment years and may prepare an affidavit for both, providing that sufficient amount of work has been performed" (SOR at 3). Moreover, Red Top asserts that "[t]he validity of filing a single copy of said affidavit * * * has been specifically upheld by the U.S. District Court for Alaska in the case of Oregon Portland Cement Co. v. United States Department of the Interior, 590 F. Supp. 52 (D. Alaska 1984)" (SOR at 3). Therein, the court reversed the Board's decision in Oregon Portland Cement Co., 66 IBLA 204 (1982), and remanded the case to the Board to take further actions consistent with its opinion.

Although in Oregon Portland Cement Co. (On Judicial Remand), 84 IBLA 186 (1984), the Board vacated its earlier decision, it expressly declined to follow the district court's rulings. The Board stated:

The Board has declined to follow federal court decisions primarily in those situations where the effect of the decision could be extremely disruptive to existing Departmental policies and programs and where, in addition, a reasonable prospect exists that other Federal courts might arrive at a differing conclusion. In our view, both conditions obtain.

84 IBLA at 190. The first ruling of the district court that the holder of a pre-FLPMA claim need only make one required assessment work or notice of intent filing prior to October 21, 1979, and annual filings thereafter was effectively overruled by the United States Court of Appeals for the Ninth Circuit in NL Industries, Inc. v. Secretary of the Interior, 777 F.2d 443 (1985). See Thurman Oil & Mining Co., 90 IBLA 342, 345-46 (1986); Buck Wilson, 89 IBLA 143, 146 n.2 (1985). The court held that annual filings are triggered by the first filing, whenever made, following October 21, 1976.

Moreover, the district court's second ruling that pre-calendar year filing of evidence of assessment work was sufficient was characterized by the Board in Oregon Portland Cement Co. (On Judicial Remand), *supra*, as "disruptive" and an "abandonment of the principle enunciated in James V. Joyce (On Reconsideration), [56 IBLA 327 (1981)], relating to early filings of assessment work." 84 IBLA at 190. In Joyce, the Board rejected the notion that filing evidence of assessment work or notice of intention to hold a claim on October 7, 1977, relieved the claimant of any requirement to make an annual filing in 1978. We held that a claimant is required to file proof of assessment or notice of intention to hold the claim within each calendar year, i.e., on or after January 1 and on or before December 30. 56 IBLA at 331.

In Robert C. LeFaivre, 95 IBLA 26 (1986), the Board applied the Joyce rule to a mining claimant who filed affidavits of assessment work for certain claims on December 17, 1982, for the 1982-83 assessment year, and made no filings in 1983. The claimant also made the argument that because of the overlapping features of the assessment year beginning in one calendar year and ending in the next, his early filing in December 1982 made it "unnecessary to make a filing during calendar year 1983." 95 IBLA at 31. The Board rejected that argument. Accord, J. E. Stevens, 86 IBLA 291 (1985). The Board's position is supported by the Supreme Court's ruling in United States v. Locke, 471 U.S. 84 (1985), upholding the constitutionality of section 314 of FLPMA, 43 U.S.C. § 1744 (1982). Therein, the Court explained the statutory mandate as requiring annual filings. 471 U.S. at 89-90.

We rule that filing a proof of labor on December 10, 1980, did not excuse Red Top from filing a proof of labor or notice of intention to hold the subject claims in the 1981 calendar year.

[3] Red Top's argument that a letter dated March 17, 1981, to BLM should constitute sufficient notice of intent to hold the claims is without merit. This letter accompanied a "composite location map" of the mining claims and the millsite. The letter stated the map was being filed in response to a notice dated September 15, 1980, from BLM which cited Red Top's "incomplete filing as required under the FLPMA Act." Red Top maintains that the March 17, 1981, letter, coupled with the December 1980 proof of assessment work, indicates its "continual interest" in the mining claims.

We do not disagree that the documents cited by appellant evidence a "continual interest" in the claims. However, as we stated in Add-Venture, Inc., 95 IBLA 44, 49 (1986), "under the controlling statute [43 U.S.C. § 1744(a)(2) (1982)] and regulation [43 CFR 3833.2-3] the question is not whether appellant supplied a document which indicated that it intended to hold its claims, but whether it filed a notice of intent." Whatever the form of the instrument that is filed with BLM, it must be filed as a notice of intent. Id.; see Robert C. LeFaivre, 95 IBLA at 32 (submission of a plan of operations does not qualify as a notice intent to hold). The statute and regulation set forth requirements governing the contents of a notice of intent, and where that notice must be filed. Appellant's March 17, 1981, letter fails to meet those requirements.

[4] Red Top contends that BLM erred in declaring its millsite abandoned and void for failure to file annually a notice of intention to hold the claim, since annual filings are not required under 43 U.S.C. § 1744(a), "which limits the annual filing requirements of an affidavit of annual labor or intent to hold notice to mining claims only" (SOR at 6). Thus, according to Red Top, 43 CFR 3833.2-1(c) is "void as ultravires [sic]," and "without authority under the enabling legislation, 43 USC § 1744, which specifically does not require such a filing" (SOR at 5). Red Top's analysis of 43 U.S.C. § 1744 (1982) is as follows:

Section 1744 was very clear in subsection (b) in specifying the requirement of the filing of the certificate of location of both

a lode or placer mining claim, as well as mill or tunnel site. The statute specifically distinguishes, and does not treat as the same, a mill site and a mining claim. The forfeiture provisions appearing in 43 USC § 1744 (c) can only operate as to a mill site for failure to file the certificate of location under subsection (b). Subsection (a) is not applicable to a mill or tunnel site.

(SOR at 6).

Red Top cites Feldslite Corporation of America, 56 IBLA 78, 88 I.D. 643 (1981) in support of its interpretation of 43 U.S.C. § 1744 (1982). Feldslite does, in fact, emphasize the distinction between lode or placer mining claims, as opposed to mill or tunnel site claims. In that case, the Board stated that as to millsite and tunnel site claims, the statute only requires the filing of notices of location, but that 43 CFR 3833.2-1 requires a claimant to file notices of intent to hold such claims. The Board ruled that whereas "a failure to comply timely and scrupulously with the express statutory requirements cannot be waived by the Department," the failure of a claimant to comply with "requirements based on purely regulatory language is subject to curative action." 56 IBLA at 82, 88 I.D. at 645.

The Board's most recent application of the rule enunciated in Feldslite appears in Ptarmigan Co., 91 IBLA 113, 118 (1986): "[T]he owners of millsites must be given notice of a deficiency and an opportunity to correct it before their millsites may be deemed void for failure to comply with FLPMA's filing requirement." E.g., James J. Kohring, 89 IBLA 345, 348 (1985); Otay Mining Co., 62 IBLA 166, 169 (1982); Mrs. Otis Teafor, 56 IBLA 367 (1981). There is no indication in the record that BLM notified appellant of the deficiency concerning the millsite claim prior to issuing its decision. We reverse BLM's decision to the extent it declared Red Top's millsite claim abandoned and void without first according Red Top an opportunity to comply with the filing requirements in 43 CFR 3833.2-3.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified as to its holding that the mining claims are abandoned and void but reversed as to the millsite claim, and the case is remanded for action consistent herewith.

Bruce R. Harris
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

R. W. Mullen
Administrative Judge.

APPENDIX A

<u>Claim Name</u>	<u>Serial No.</u>	<u>Location Date</u>
Red Top Mill Site	AA-38981	October 28, 1971
ARCANA Discovery Claim	AA-38982	June 25, 1965
Feeder Gulch Claim	AA-38983	June 25, 1965 East
Extension of the Red Top Lode	AA-38984	May 13, 1943
Red Top No. 1	AA-38985	April 16, 1952
East Extension of the Red Top No. 1.	AA-38986	April 16, 1952
Red Top	AA-38987	April 16, 1952

96 IBLA 397

